Supreme Court, U.S.
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No. 01-1886

IN THE

Supreme Court of the United States

HELEN EDWARDS and CHRISTOPHER EDWARDS,

Petitioners,

v.

ACADIA REALTY TRUST, INC. and WELLS FARGO GUARD SERVICES, INC. OF FLORIDA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT ACADIA REALTY TRUST, INC.

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PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

In addition to the parties listed by Petitioners, two additional parties warrant mention. Searstown Mall Association, Inc. and the City of Titusville, Florida were defendants in the proceeding below. The claims against Searstown Mall and the City of Titusville were settled and, as such, the Petition does not raise any issue with respect to those parties.

Acadia Realty Trust, Inc. is a fully integrated, self-managed and self-administered equity REIT focused on the ownership, acquisition, redevelopment and management of neighborhood and community shopping centers. To the best of our knowledge, there is no publicly-held company that owns ten percent (10%) or more of Acadia Realty Trust, Inc.'s stock.

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STATEMENT OF THE CASE

This Petition was filed in an attempt by Petitioners to radically alter the present, long-standing precedent underlying 42 U.S.C. §§ 1981 and 1983 claims in an effort to elevate the rights of non-minorities over minorities who suffer direct discrimination. Petitioners argue that a "good faith belief" of racial discrimination, rather than proof of intentional discrimination, is the only proof that should be required to prevail on the merits of a § 1981 claim. Further, Petitioners seek to have this Court eliminate the requirement of establishing a policy and custom of discrimination by private employers in a § 1983 claim.

Neither the Eleventh Circuit's ruling, nor the record below, support such a radical change in the law. The ruling is not in conflict with this Court's opinions or the opinions of other Circuit Courts in addressing racial discrimination claims under §§ 1981 and 1983. As such, the Petition should be denied.

STATEMENT OF THE FACTS

Searstown Mall is a shopping center located in Titusville, Florida. It is privately owned and operated currently by an entity known as Searstown Mall Association, and formerly by a separate entity known as Acadia. (R4-114-12, 22-23). At all times material, Wells Fargo, a private security company was hired to provide security guard services at the Mall. (R4-114-47). Wells Fargo and all security guards employed therein, were not employees of Acadia but were merely independent contractors. The security guards were directed to patrol the Mall and to enforce the posted rules of the Mall. (R4-114-47). One of the security guards employed by Wells

Fargo and assigned to work at the Mall was Andrew Bankowski. (R4-116-35). The Mall manager at all times relevant was Ms. Deborah Hardy. Ms. Hardy has successfully been employed by Acadia Realty and Searstown Mall Association. (R4-114-12.26).

The State of Florida leased space at the Mall and established an employment office. (R5-141). The Mall had no special relationship with the employment office that was different than any other tenant at the Mall. (R5-141). The security officers at the Mall had no special relationship with the employment office that was different than any other tenant of the Mall. (R4-116).

On November 20, 1998, Helen and Christopher Edwards visited the Mall with their two sons and a friend of their sons. (R4-108-32). On that night, Mr. Bankowski was providing security guard services at the Mall. (R4-116-6). While the boys saw a movie, Mr. and Mrs. Edwards ate dinner at a Mall restaurant. (R4-111-41) During their dinner, they had occasion to observe a group of young black girls eating in the restaurant. Petitioners described the girls as well-behaved. These children were not accompanied by an adult. After dinner, Petitioners browsed the Mall and then proceeded to sit on a bench near the movie theater to wait for their sons to exit. (R4-111-43-44). While waiting on a bench inside the Mall for their sons to exit the movie theatre, they observed unaccompanied minors being disruptive in the Mall. (R4-112). A group of Caucasian minors asked the Petitioners for some change, which was a violation of Mall policy. (R4-112). Petitioners did not make any complaint about the behavior of the group of Caucasian children. (R4-112). Petitioners did not observe a security guard

approach the white children and admitted that the security guard may have escorted these children out of the Mall that evening, but may not have witnessed it. (R4-111-112).

Later, Petitioners observed Mr. Bankowski and another Wells Fargo security guard interacting with a group of young black girls (R4-111-53, 54). As the guards approached the girls, one of the guards asked the girls "what their business was" in an authoritative voice. (R4-111-55, 56). The girls told the guards that they were waiting inside for their parents to pick them up. (R4-11-56). According to Petitioners, Mr. Bankowski replied that he did not care and that the girls needed to get their "black asses out of there." (R4-111-56; R4-112-151). The girls then left the Mall. (R4-111-57).

Thereafter, Petitioners sat on the bench for about ten to fifteen minutes to wait for their sons. (R4-111-76,77). During this time, Petitioners had an opportunity observe the security guards approach another group of children, this time an unaccompanied group of black boys. (R4-111-46). Again, the guards asked the boys what they were doing with a reply that they were there to see a movie. (R4-111-47). The guards told them that they "needed to get there." (R4-111-47). At that time, Mrs. Edwards did not feel that the boys were treated unfairly. (R4-111-48). Mr. Bankowski explained that it was better from a security standpoint for the children to be in well-lighted areas outside where the security guards can keep an eye on them. (R4-116-23). Additionally, parents picking their children up do not want to have to go inside the Mall to pick up their children. (R4-116-23, 24).

Helen Edwards assumed that Mr. Bankowski was forcing the girls to leave the Mall because the girls were black. (R4-111-55, 56). As such, while Mr. Bankowski was in the

process of escorting the young black girls from the Mall, a verbal confrontation ensued between Mrs. Edwards and Mr. Bankowski (R4-111-63, 64; R4-116-7-11). Mrs. Edwards asked if there was a problem with the black girls and when Mr. Bankowski tried to explain, she would not listen. (R4-111-64, 66). Mrs. Edwards acknowledged that she did not give him a chance to explain his actions. (R4-111-66). As a result of this confrontation, Mr. Bankowski telephoned the Titusville Police Department, requesting the issuance of a trespass warning against an adult couple sitting on the benches inside near the movie theatres. (R4-116-6, 12; R). In response to Mr. Bankowski's call, Titusville police officers were dispatched to the Mall. The Titusville police officers were met by Mr. Bankowski upon their arrival and were told to issue trespass warnings against Mrs. Edwards who was in the process of exiting the Mall. (R4-116-14). Upon questioning as to the issuance of the trespass warning, Mr. Bankowski informed the Titusville police officers that Mrs. Edwards had been interfering with his duties as a security guard by yelling at him. (R4-116-14, 15).

The police officers then performed their own investigation by speaking with Petitioners. After doing so, a trespass warning was issued to Mrs. Edwards, not Mr. Edwards. This trespass warning was maintained on the Mall premises by Debra Hardy. (R4-114-51, 52, 79). Mrs. Hardy was not present when Mr. Bankowski contacted the Titusville police officers nor during the confrontation between Mr. Bankowski and the Petitioners. (R4-114).

Mrs. Hardy admits she was not in a position to know what happened between Mr. Bankowski and the Petitioners resulting in the issuance of the trespass warning. (R4-114). Mrs. Hardy's only knowledge of the incident was from the

written trespass warning which stated that Mrs. Edwards were trespassed from the Mall based on a verbal confrontation with a Wells Fargo security guard, Mr. Bankowski. (R4-114-21). As such, Mrs. Hardy believed that Mr. Bankowski had the legal right to exclude her from the Mall for interfering with his duties as a security officer. (R4-114-21). After the trespass warning was issued to Mrs. Edwards, the Petitioners requested that Mall management rescind the trespass warning so that they could be allowed to enter the Mall. (R4-114-10, 20-21). The Mall granted the Edwards' request and the trespass warning was rescinded. (R4-114-7).

Pursuant to the Titusville police department's practice, a police officer has the discretion to refuse to document a trespass warning if the police officer believes that the request has an unlawful basis. If there are any questions regarding the appropriate action to take, the police officer is supposed to contact supervisory personnel. The officers did not believe that Mr. Bankowski had an unlawful basis for requesting that Mrs. Edwards be given a trespass warning, and, therefore did not contact supervisory personnel. (R4-118-7).

Mrs. Edwards testified that neither she nor her family had any other encounter with the Mall security before November 20, 1998 except on one occasion following the incident. (R4-112-189, 193-195). According to Mrs. Edwards, her sons and nephew were walking through the Mall when security approached the unaccompanied children and told them to get back with their parents. (R4-112-193-195). Mrs. Edwards testified that she did not believe the guards knew her sons or that they were motivated by skin color on this occasion. (R4-112-193-195).

Respondent does not have a policy, practice, or custom of discriminating against minorities in places of public accommodation or elsewhere. Likewise, Respondent does not have a policy, practice, or custom or discriminating against non-minorities who accompany or speak out in opposition to discrimination against minorities. (R4-112-223). Rather, the Mall policy was that all children needed to be accompanied by an adult and, if not, would be escorted from the Mall.

REASONS FOR DENYING THE WRIT

I. The Eleventh Circuit's Ruling Does Not Conflict With Other Circuit Court Decisions Of Racial Discrimination In Places Of Public Accommodation

It is apparent that Petitioners want this Court to grant certiorari because they believe that their own *perception* that several black children were being treated differently than white children is sufficient to establish a claim under § 1981. This argument is clearly erroneous.

Section 1981 prohibits *purposeful discrimination* on the basis of race. *General Building Contractors Association v. Pennsylvania*, 458 U.S. 375, 391 (1982). To recover, a claimant must show that (1) they are members of a racial minority; (2) the defendant *intentionally* discriminated on the basis of race; and (3) the discrimination concerned a right enumerated in the statute. *Id.* Intentional race-based discrimination is essential to recovery under § 1981. *Brown v. American Honda Motor Company, Inc.*, 939 F.2d 946 (11th Cir. 1991); *Smith v. Dallas County Board of Education*, 480 F. Supp. 1324 (S.D. Ala. 1979). Mere speculation, "belief" or presumptions is not sufficient to

establish direct evidence of discrimination. *Jones v. Winn-Dixie Stores, Inc.*, 75 F. Supp. 2d 1357, 1362 (S.D. Fla. 1999). In fact, the Eleventh Circuit has recognized that "the mere utterance of an ethnic or racial epithet which engenders offensive feelings" does not in and of itself prove intentional discrimination as required under § 1981. *See Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982).

The long-standing precedent of racial discrimination claims in places of accommodation, including claims of retaliation, demonstrate the need of establishing intentional discrimination under § 1981. *See Jackson v. Tyler's Dad's Place, Inc.*, 850 F. Supp. 53, 55 (D.D.C. 1994) (citing *Bray v. RHT, Inc.*, 748 F. Supp. 3, 5 (D.D.C. 1990) (wherein summary judgment was granted in favor of a restaurant because plaintiffs failed to allege any facts supporting their charge that they were denied seating in the main dining room because of their race); *See also White v. Denney's, Inc.*, 918 F. Supp. 1418, 1423-1424 (D. Colo. 1996) (wherein the court granted summary judgment against four African-American women because of their complete failure to show that they were treated differently than other similarly situated people in the restaurant).

Although Respondent would agree with Petitioners that § 1981 claims apply the same prima facie standards as those claims brought pursuant to Title VII, Respondent disagrees that a party must prove only a "good faith belief" that the alleged discrimination existed under § 1981. Such a premise completely disregards established law that requires proof of intentional discrimination under § 1981. *Brown v. American Honda Motor Co., Inc.*, 939 F.2d 946, 949 (11th Cir. 1991). Rather, to establish a prima facie case under § 1981, outside of the employment context, a claimant must prove each of the following elements:

(1) That they are members of a protected class;

(2) That they attempted to afford themselves the full benefits and enjoyment of a public accommodation;

(3) That they were denied those benefits and enjoyment; and

(4) That similarly situated persons who are not members of the protected class received the full benefits or enjoyment or were treated better.

Laroche v. Denny's, Inc., 62 F. Supp.2d 1366, 1370 (S.D. Fla. 1999). Once the prima facie case is established, the burden shifts to the defendant to come forward with evidence of a legitimate, nondiscriminatory reason for its conduct. *Brown v. American Honda Motor Co., Inc.*, 939 F.2d 946, 949 (11th Cir. 1991).

Based upon the undisputed material facts presented in the instant case, the Eleventh Circuit was correct in affirming the order of the District Court. Most importantly, there is no evidence that Petitioners were trespassed from the Mall based upon any discriminatory motive on the part of Respondent. Petitioners merely speculated that they were trespassed because of their opposition to what they perceived to be race-based discrimination. The law is clear, however, that suspicion, perception, opinion and belief cannot be used to defeat a motion for summary judgment. *Local No. 48, United Bhd. of Carpenters & Joiners v. United Bhd. of Carpenters & Joiners*, 920 F.2d 1047 (1st Cir. 1990).

Likewise, Petitioners failed to prove that similarly situated white individuals in the Mall were treated more favorably. Petitioners attempt to do so by claiming that other white children in the Mall were treated differently than the black girls. The sum of Petitioners' evidence presented on this point is that the white children were misbehaving and they did not witness any white children being ejected by mall security. Despite this, Mrs. Edwards admitted that they didn't observe the security guards except during the 10 - 15 minutes that they sat on the bench, nor do they know if other white children were confronted or escorted out of the Mall by security at any other point in the evening. As such, the Eleventh Circuit was correct in its analysis that the Petitioners cannot seek greater protection under the laws than those of minorities themselves.

Even if Petitioners were to establish a genuine issue of material fact on their prima facie case, their claims still fail as Respondent demonstrated legitimate, non-discriminatory reasons for Mr. Bankowski's actions of escorting the children from the mall. Mr. Bankowski testified that it was his practice to escort children out of the mall on weekends, not because of race, but for the safety and security of the people. Given that Petitioners failed to produce even a scintilla of evidence to dispute these reasons, summary judgment in favor of Respondent was warranted.

II. The Eleventh Circuit's Ruling Did Not Address, Let Alone Conflict, With This Court Or Other Circuit Court Opinions Regarding Petitioner's Standing To Bring A Claim Under 42 U.S.C. § 1981

Nothing in the record below supports Petitioners' assertion that the Eleventh Circuit relied upon *Little v. United Technologies*, 103 F.3d 956 (11th Cir. 1997) in reaching its decision. Rather, the Eleventh Circuit's order clearly states that it relied upon argument counsel and the orders of the District Court in reaching its opinion. The record actually reveals that although Respondents argued Petitioners lacked standing to bring their claims, the District Court disagreed, concluding Petitioners had standing to bring their claim of retaliation for opposing racial discrimination based upon the long-established holdings of this Court and of other Circuits that addressed the issue, citing to *Gordon v. City of Cartersville*, 522 F. Supp. 753, 756 (N.D. Ga. 1981); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969) (non-minority had standing to bring claim against subdivision that expelled non-minority for advocating the right of a black to lease the non-minority's house); *Faraca v. Clements*, 506 F.2d 956 (5th Cir. 1975) (non-minority had standing to bring suit when non-minority was refused employment because non-minority was marred to a black person); *DeMatteis v. Eastman Kodak Co.*, 511 F.2d 306 (2d Cir. 1975) (non-minority had standing to bring action against former employer who terminated him for selling non-minority's home to black); *Adler v. Columbia Historical Society*, 690 F. Supp. 9 (D.D.C. 1988); *Riccobono v. Whitpain*, 497 F. Supp. 1364 (E.D. Pa. 1980).

Further, the Eleventh Circuit's opinion in *Little v. United Technologies*, 103 F.3d 956 (11th Cir. 1997) should not be

used as a basis for granting the petition as it is limited to the facts and circumstances of that case. *Little* clearly stands for the proposition that retaliation claims brought pursuant to Title VII and § 1981 are different. Respondent further acknowledges that *Little* can be read to prohibit suits under § 1981 where the retaliation alleged is not based on the race of the complainant. However, prior to the discussion of the validity of Plaintiff's § 1981 claim in *Little*, the Eleventh Circuit analyzed at length Plaintiff's failure to show that he had engaged in statutorily protected conduct that would give rise to a retaliation claim under Title VII. Therefore, *Little* does not stand for the proposition asserted by Petitioners that a white claimant alleging retaliation for opposing discrimination never has standing to bring a claim under § 1981. In fact, in the same year *Little* was decided, the Eleventh Circuit again addressed the issue and recognized the ability of white claimants to bring claims of retaliation for discrimination under § 1981. *See Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999 (11th Cir. 1997) (where white employees allegedly were retaliated against for complaining of discrimination against black employees, white plaintiffs had standing to proceed under § 1981). Thus, the petition should be denied on those grounds.

III. Certiorari Should Be Denied Because The Eleventh Circuit's Holding Follows The Long-Established Rulings Of This Court Requiring Proof of A Policy And Custom

This Court has placed strict limitations on municipal liability under § 1983. *See Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 691 (1978). The Eleventh Circuit, following this Court's long-established precedent in this regard, has held that a defendant cannot be

liable under § 1983 on a *respondeat superior* or vicarious liability basis. *Harvey v. Harvey*, 949 F.2d 1127, 1129 (11th Cir. 1992). Other Circuits have followed suit, including the Eighth Circuit in *Sanders v. Sears Roebuck & Co.*, 984 F.2d 972 (8th Cir. 1992) (wherein the court held that Sears could not be held liable under § 1983 on a *respondeat superior* theory even though the security guard was employed by Sears). *Id.*; *See also Scutieri v. Estate of Philip Revitz*, 683 F. Supp. 795 (S.D. Fla. 1988) (holding that as a matter of law, a private corporation cannot be liable strictly on the basis of *respondeat superior* theory under § 1983).

Despite the well-established precedent, not only in the Eleventh Circuit, but in most other Circuits, the Petitioners argue for the reversal of existing law (i.e., private corporate liability under *respondeat superior*) based on this Court's holding in *Richardson v. McKnight*, 521 U.S. 399 (1997). In *Richardson*, this Court merely decided the very narrow issue of whether employees of a private prison management firm are entitled to a qualified immunity from suit by prisoners charging a violation of 42 U.S.C. § 1983. However, this Court stated that the holding of *Richardson* was limited to the context in which a "private firm, systematically organized to assume a major, lengthy administrative task (managing an institution) with limited direct supervision by the government, undertakes that task for profit and potentially in competition with other firms." *Richardson* 521 U.S. at 412. Thus, the focus of this Court was strictly related to the issue of quality immunity, not liability. *Id.*

First and foremost, qualified immunity generally provides government officials with a shield from suit to avoid the expense and disruption of going to trial and is not a liability issue. *See Ansley v. Heinrich*, 925 F.2d 1339, 1345

(11th Cir. 1991). The *respondeat superior* and/or vicarious liability doctrine, on the other hand, is a question of liability and the mechanisms of holding a corporation liable for the acts of its agent and/or employee. Thus, it addresses the merits of a cause of action, not the entitlement to bring suit. These distinct differences were not addressed by this Court in *Richardson* and as such, the doctrines as set forth therein are not applicable in the instant case.

Moreover, the concerns in *Richardson* do not appear to be particularly relevant in the instant case. In *Richardson*, the private entity faced competitive pressures from other firms which would cause it to make sure that its guards were acting appropriately. *Richardson*, 521 U.S. 399 (1997). In other words, the employees who allegedly violated rights were performing tasks pursuant to the entity's fulfillment of an administrative task as a contractor with the state. In this case, however, we are dealing with a privately-owned Mall and the issuance of trespass warnings for behavior which interfered with private security guard duties. There is no contract with the state to perform any types of tasks nor to perform any functions which are traditionally those of the state (i.e., management of prisons). Here, Respondent is not competing with any other firm for government contracts. In other words, Respondent does not have the same competitive pressures that were identified in *Richardson* because (1) it is not competing for government contracts, and (2) the individual Defendants were performing tasks incidental to the entity's main purpose of providing services to customers in the form of retail stores for shopping. Therefore, the different factual posture of the instant case from *Richardson* leads to the conclusion that the need for a change and/or reversal of existing precedent as it relates to the *respondeat superior* doctrine in this context is not

warranted. Thus, because the policy concerns which prompted this Court in *Richardson* to preclude qualified immunity for private parties performing traditional functions of the state, are not applicable to the unique factual circumstances presented by this case, the petition should not be granted.

IV. Certiorari Should Be Denied Because Petitioners Failed To Adduce Evidence Of A Policy Or Custom Of Respondent To Discriminate On The Basis Of Race

Petitioners purport to allege that Respondent violated their right of free speech as guaranteed by the United States Constitution. They assert these violations in accordance with the 42 U.S.C. § 1983 which provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State, or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

42 U.S.C. § 1983. To recover under § 1983, a plaintiff must establish that a defendant's act or omission, *done under color of state law*, deprived the plaintiff of a right, privilege, or immunity protected by the Constitution or the laws of the United States. *See Harvey v. Harvey*, 949 F.2d 1127, 1130 (11th Cir. 1992); *Little v. City of North Miami*, 805 F.2d 962, 965 (11th Cir. 1986) (citation omitted); *see also Adickes v.*

S.H. Kress & Co., 398 U.S. 144, 150 (1970). Section 1983 does not create substantive rights; it instead provides remedies for denial of rights protected by the Constitution or other federal law. *Little*, 805 F.2d at 965 (citation omitted).

The First Amendment provides individuals with the right of free speech. However, "the guarantees of the First Amendment have never meant that people who want to [protest] have a constitutional right to do so whenever, however and wherever they please." *Greer v. Spock*, 424 U.S. 828, 836 (1972) (quoting *Adderley v. Florida*, 385 U.S. 39, 48 (1966)). The degree of protection guaranteed by the First Amendment varies depending on the form in which the speech occurs. Absent special circumstances, which are not present in the instant case, the First Amendment does not provide for the right of free speech on privately owned property such as the Searstown Mall.

As Respondent argued below, Petitioners do not even make it to the policy and custom element of a § 1983 claim because Respondent is not a state actor subject to § 1983 liability. This Court discussed the "state action" pre-requisite of the Fourteenth Amendment in relation to the "under color of state law" element of § 1983 in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924 (1982) and set forth a two-part test for deciding whether conduct allegedly denying a plaintiff a federal right is "state action." *Id.* at 937. First, "the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person from whom the State is responsible." *Id.* Second, the party denying the right must be "a person who may fairly be said to be a state actor." *Id.* This second element may be satisfied by finding that the party is a state official, acted in concert with state officials, or

because his conduct is otherwise chargeable to the state. *Id.* Accordingly, the concepts of "state action" and "color of state law" combine when one accused of denying a federal right is one whose official character is such as to lend the weight of the state to his decision. *Id.* However, the concepts remain distinct when a private party is accused. *Id.*

The Eleventh Circuit has held that a private party rarely may be considered a "state actor" for purposes of § 1983. *Harvey v. Harvey*, 949 F. 2d 1127, 1130 (11th Cir. 1992). In determining whether a private person's or entities' actions amount to state action, the Eleventh Circuit has recognized three separate tests: 1) the public function test; 2) the state compulsion test; and 3) the nexus/joint action test. *NBC v. Communication Workers of America, AFL-CIO*, 860 F.2d 1022, 1026 (11th Cir. 1988).

A private party is deemed to be a state actor under the public function test only if it exercised powers traditionally exclusively reserved to the state. *Id.* at 1026. This has been interpreted narrowly, generally applying only to functions like holding elections and exercising eminent domain. In fact, it has been held that even where a private party has powers co-extensive with the state, there can be no state action unless private actors are given powers traditionally the exclusive prerogative of the State. *Harvey*, 949 F.2d at 1131. Few activities are reserved to the state and Petitioners have failed to cite any authority for the premise that they have a constitutional right to be free from a trespass warning.

Applying these principles to the case at hand, Respondent's conduct did not amount to state action under the public function test. The Petitioners contend that the exclusive state function that has been delegated in this case

is the control over access to the State of Florida Unemployment Benefits Office located within the Mall and/ or the security guards alleged authority to guard this governmental office. This argument fails, "because controlling access to public facilities leased by the government is simply not a function that has been traditionally exclusively reserved to the state." *See Southwest Community Resources, Inc., et. al. v. Simon Property Group, LP, et. al.*, 108 F. Supp. 2d 1239 (D.C. Mexico 2000).

Likewise, Plaintiffs' argument fails in that the Mall is not a public forum. Private property does not lose its private character merely because the public is generally invited to use it or merely because governmental offices happen to be located therein. *Southwest Community*, 108 F. Supp. 2d at 1255. It is clear that private property cannot become a public forum unless the private owner specifically intends to designate it as such. *Id.* at 1256. "Plaintiffs argument ultimately fails because the nature of the mall's invitation to the public is only to do business with the mall's tenants (including the government facilities) not to engage in any expressive activities." *Id.* Such an invitation would be insufficient to create a designated public forum." *Id.* Based on the foregoing, Petitioners cannot demonstrate state action on the part of Respondent under the public forum test merely because a government unemployment office is located within the Mall.

The evidence in the record also clearly demonstrates that Respondent is not a state actor under the nexus/joint action test because the Petitioners failed to prove that the government has "so far insinuated itself into a position of interdependence with the private party that it was a joint participant in the enterprise." *Harvey v. Harvey*, 949 F.2d at

1130. Petitioners purport to claim that this test is met because of alleged contact between Respondent and the City of Titusville in the issuance of trespass warnings. This evidence is clearly not sufficient to establish a conspiracy or joint action under the color of law. *See Mann v. Hillsborough County Sheriff's Office*, 946 F. Supp. 962, 968 (M.D. Fla. 1996) (although police presence during the entering of plaintiff's home without her presence and permission and preventing plaintiff from access to her home may constitute wrongs, it does not rise to the level of a conspiracy or joint action necessary to show color state law required under § 1983).

Likewise, the undisputed facts in the instant case do not rise to the level of state action on the part of Respondent under the nexus/joint test. In fact, Mrs. Edwards admitted in her deposition that no one from the Mall was present on the night of the incident. Further, there is no evidence to support that any one from Respondent was even aware of the situation or the issuance of the trespass warning on the evening in question. Mrs. Edwards testified that she was unaware of any facts to support her contention that the Mall knew what the security guard was doing. (R4-111-211-212). Further, the record reveals that other than mere assumptions that the police were contacted by the security guard, the Petitioners have failed to come forth with any evidence to establish contact between the Mall and the City of Titusville Police Department. (R4-112-220).

Despite the fact that the record clearly reveals that the Respondent is not a state actor, the Petitioners also failed to demonstrate a policy or custom of Respondent to discriminate on the basis of race. Respondent did not have any official policies or procedures evidencing racially discriminatory

intent on its part in the issuance of trespass warnings. Mrs. Edwards admitted during her deposition that she had no personal knowledge or information regarding Mall policies about race. (R4-112-223). Moreover, Mrs. Edwards admitted that on numerous previous occasions at the Mall, she was never subjected to any racially discriminatory policy or practice of the Mall. (R4-112-223).

Mrs. Hardy also indicated that she was unaware of any prior complaints of discrimination at the Mall. (R4-114-57). Likewise, Petitioners failed to adduce any evidence that Mr. Bankowski was a policy-making employee of Respondent. Petitioners attempt to circumvent this proof merely by conclusory statements that Mr. Bankowski was an "agent" of Respondent. Even assuming this to be true, this alone does not prove that Mr. Bankowski was a policy-making employee. Petitioners offered no evidence that Mr. Bankowski created Mall policy, rules, regulation or otherwise. Rather, Petitioners simply asserted through conclusory statements that he implemented what was perceived to be discriminatory issuance of a trespass warning.

In the same vein, Petitioners also failed to establish that Mrs. Hardy was a policy-making employee. Although admittedly she was the manager of the Mall running the day-to-day activities, Petitioners did not prove that she was the individual responsible for setting policies regarding the issuance of the trespass warnings. In fact, when questioned about rescinding it, Mrs. Hardy informed that she would have to contact her superiors regarding this policy. Without more, there were insufficient facts to preclude the entry of summary judgment.

Petitioners purport to prove a policy or custom based upon a single incident by relying upon this Court's opinion in *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989). However, the Eleventh Circuit in *Gold v. City of Miami*, 151 F.3d 1346 (11th Cir. 1998) recognized the narrowness in which a single incident meets the policy or custom test:

> To establish a deliberate or conscious choice or such deliberate indifference, a plaintiff must present some evidence that the municipality knew of a need to train and/or supervise in a particular area and the municipality made a deliberate choice not to take any action.

Id. at 1349. Thus, without notice of a need to train, a municipality is not liable as a matter of law for any failure to train and supervise. Based on the foregoing, Petitioners simply failed to adduce any evidence of a need to train or of any policy or custom to discriminate, and therefore the petition should be denied.

V. Certiorari Should Be Denied Because The Eleventh Circuit's Ruling Followed Well Established Precedent Regarding Free Association Claims Under § 1983

As the District Court noted and the Eleventh Circuit affirmed, there are only two forms of association which are protected under the United States Constitution: "intimate association" and "expressive association". *Cummings v. DeKalb County*, 24 F.3d 1349, 1354 (11th Cir. 1994) (citations omitted). The right of intimate association encompasses the personal relationships that attend the creation of a family. *McCabe v. Sharrett*, 12 F.3d 1558 (11th Cir. 1994). Expressive association, on the other hand,

is protected by the First Amendment where the purpose of the association is to engage in activities independently protected by the First Amendment. *Id.*

The only mention of any association in the Third Amended Complaint is in paragraph 41, which reads: "At all times relevant, all Defendants acted toward Plaintiffs because of the Defendants' association of Plaintiffs with people of color." The First Amendment does not provide a constitutional right to associate with people of color per se. Instead, the association with people of color is protected only if it falls within the definition of intimate association or expressive association. Contrary to the assertions made by Petitioners, they did not allege in their Third Amended Complaint that they had a familial relationship with the black girls or that they were associating with the black girls for any purpose independently protected by the First Amendment. Petitioners' assertion that it was unnecessary to allege that they even made contact with the black children completely defies clearly established law requiring "association" for a violation.

Petitioners attempt to rescue their free association claim by pleading association with each other still falls short of asserting a recognizable free association claim. In this regard, Petitioners state that Mr. Edwards was banished from the mall solely because of his intimate association with his wife, who voiced her opposition to discrimination; and, Respondent associated Mr. Edwards with his wife. This clearly does not satisfy the requirements of intimate association as there is simply no allegation that Petitioners were retaliated against because they chose to enter into and maintain the intimate human relationship of marriage. Moreover, there is no allegation that Petitioners were

associated with each other for purposes giving rise to expressive association protections. Accordingly, the Eleventh Circuit's ruling in affirming the dismissal of Petitioners' freedom of association claims was proper.

VI. The Eleventh Circuit's Ruling Does Not Conflict With This Court's Decisions Regarding Equal Protection Claims

In Count III of their Third Amended Complaint, Petitioners claimed race-based denial of public accommodation, in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution brought under 42 U.S.C. § 1983. To determine whether a party has violated the rights afforded persons under the Equal Protection Clause of the Fourteenth Amendment, it is necessary to demonstrate intentional racial discrimination in addition to proof that the victim is being treated differently on the basis of race than those persons who are similarly situated. *Rodriguez v. Lamer*, 60 F.3d 745, 749 (11th Cir. 1995) (citations omitted). Different treatment of dissimilarly situated persons does not violate the Equal Protection Clause. *E & T Realty v. Strickland*, 830 F.2d 1107, 1109 (11th Cir. 1987).

Plaintiffs' Third Amended Complaint is completely devoid of any allegations alleging that they were treated differently than similarly situated individuals, i.e. white patrons who opposed racial discrimination of black patrons of the mall. In fact, the Third Amended Complaint alleged that all persons that the Mall owners requested to have trespassed were in fact trespassed by the police. As such, Petitioners failed to plead that they were treated differently than any other person who was trespassed or than any other

person who allegedly interfered with the security guards' performance of their duties. Accordingly, dismissal of Petitioners Equal Protection claim was appropriate.

CONCLUSION

Based on the foregoing facts and authorities, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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